IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O. O. C. J.

WRIT PETITION NO.1119 OF 2003

Saurashtra Trust Karmachari Sangh ..Petitioner.

Vs.

The State's People Private Ltd.

& anr. ..Respondents.

....

Mr. Jaiprakash Sawant for the Petitioner.

Mr. R.S. Pai for Respondent No.1.

....

CORAM : DR.D.Y.CHANDRACHUD, J.

14th January, 2005.

ORAL JUDGMENT :

1. The Petitioner is before the Court in these proceedings under Article 226 to impugn the correctness of an order dated 8th October, 2002 passed by the Industrial Court dismissing a complaint alleging the commission of an unfair labour practice under Item 9 of Schedule IV of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971.

2. The First Respondent is a company engaged in

the business of managing and conducting the printing and publication of newspapers and periodicals. The company was established in the year 1933. On 8th July, 1955 standing orders for the employees of the First Respondent engaged in (i) Janmabhoomi Mudranalaya and (ii) States' People Press, situated at Janmabhoomi Bhavan, Ghoga Street, Fort, Mumbai were certified by the Commissioner of Labour and Certifying Officer under Section 5 of the Industrial Employment (Standing Orders) Act, 1946. Though the complaint as originally filed before the Industrial Court was filed on behalf of 13 employees, it now survives in respect of two employees since the other employees have accepted their dues and voluntarily left service. These two employees are : (i) Dattaram Khanwilkar and (ii) Danbahadur Dixit. Both these employees were appointed respectively in pursuance of appointment orders dated 1st May, 1965 and 7th April, 1969. Khanwilkar was appointed as Compositor where as Danbahadur was appointed as a Line Operator. The letters of appointment specifically provide that the age of superannuation will be 55 years. The union filed a complaint on behalf of a group of 13 workmen, aggrieved by a

circular of the management and apprehending that acting on the basis of that circular dated 6th August, 2001, these employees would be retired upon the completion of the age of 58 years. Two alternative hypothesis were put forth in the complaint, the first being that the First Respondent was governed by the Industrial Employment (Standing Orders) Act, 1946 and as there were no certified standing orders, the Model Standing Orders would apply. It was submitted that under the Model Standing Orders, the age of superannuation for the employees would be 60 years. In the alternative, it was also pleaded that in accordance with the long standing practice which had become part of the statutory conditions of service, the employees have been retired only upon the completion of the age of 60 years. The employer filed his written statement contending that the Model Standing Orders had no application since the management had its own certified standing orders. Moreover, it was submitted that though some employees have been retained in service until the age of 60 years this was in as much as their services were needed, at that particular time. There was no practice, long standing or otherwise,

for retiring the employees upon completion of the age of 60 years.

3. Evidence was adduced on behalf of the parties before the Industrial Court and by the impugned order dated 8th October, 2002, the complaint came to be dismissed. The Industrial Court relied upon the term contained in the letter of appointment to the effect that the age of retirement was 55 years. The Court noted that out of 13 workmen, 11 had accepted their dues and were not interested in pursuing the complaint and that even the remaining two workmen had initially accepted their retiral dues without protest. The Court held that there was no mention of any age of retirement in the Certified Standing Orders in which event the age of retirement would be that which was stipulated in the letter of appointment and that even if the complainant workman had been allowed to continue in service beyond the age of 55, that would not entitle them to continue until the age of 60 years. Moreover, the Court held that there was no evidence or proof to give rise to an inference of the existence of a custom of retiring the employees only at the age of 60 and that stray cases of

employees who retired at the age of 60 would not prove the existence of a custom. The Court ruled that the category of those workmen and of the complainants was different. For all these reasons, the complaint was dismissed.

4. Two submissions have been urged before the Court in assailing the judgment of the Industrial Court. The first submission was that the Certified Standing Orders pertaining to the establishment of the First Respondent were silent in regard to the age of retirement. In that event, it was submitted, the Model Standing Orders under the Industrial Employment (Standing Orders) Act, 1946 must apply and that the age of superannuation therein must be the governing principle. The second submission was that even if the Model Standing Orders are held not to be applicable, the evidence on the record shows the existence of long standing practice which has ripened into a custom and the order of the Industrial Court needs to be interfered with, since it had ignored the relevant and material evidence.

5. In so far as the first submission is concerned,

it would be necessary to note at the outset that the standing orders in respect of the establishment of the First Respondent were certified by the Commissioner of Labour as certifying authority under the Industrial Employment (Standing Orders) Act, 1946 on 8th July, 1955. The date of certification in the present case assumes importance because under the Act as it was originally enacted in 1946, the Schedule thereto which delineates matters to be provided in the Standing Orders did not contain a reference to the age of retirement or superannuation. In **Rohtak and Hissar Districts Electric Supply Co.Ltd. Vs. State of Uttar Pradesh**, AIR 1966 SC 1471, Chief Justice P.B.Gajendragadkar speaking for a Constitution Bench of the Supreme Court held that the draft Standing Orders of the employer cannot relate to matters outside the Schedule to the Industrial Employment (Standing Orders) Act, 1946. The Court held that the true position was that under Section 3(2), employers have to frame draft Standing Orders and they must normally cover items in the Schedule to the Act. If, however, it appears to the appropriate authorities that having regard to the relevant facts and circumstances, it

would not be unfair and unreasonable to make a provision for a particular item, it would be competent for them to do so; but the employer cannot insist upon adding a condition to the Standing Order which relates to a matter which is not included in the schedule. This principle was followed by a Division Bench of this Court in **Maharashtra General Kamgar Union Vs. Bharat Petroleum Corporation Ltd.**, 1996 II CLR 545 (at para 21 page 557). Section 2-A of the Act was brought in by way of an amendment initially by Bombay Act 21 of 1958. Section 2-A as it now stands reads as follows :

> "2A. Application of model standing orders to every industrial establishment - (1) Where this Act applies to an industrial establishment, the model standing orders for every matter set out in the Schedule applicable to such establishment shall apply to such establishment from such date [as the State Government may by notification in the official Gazette appoint in this behalf ;
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> Provided that nothing in this section shall

be deemed to affect any Standing Orders which are finally certified under this Act and have come into operation under this Act in respect of any industrial establishment before the date of the coming into force of the Industrial Employment (Standing Orders) (Bombay Amendment) Act, 1957].

(2) Notwithstanding anything contained in the proviso to sub- section (1) model standing orders made in respect of additional matters included in the Schedule after the coming into force of the Act referred to in that proviso (being additional matters relating to probationers or badlis or temporary or casual workmen) shall unless such model standing orders are in the opinion of Certifying Officer less advantageous to them than to corresponding standing orders applicable to them under the said proviso also apply in relation to such workmen in the establishments referred to in the said proviso from such date as the State Government may, by notification in the Official Gazette, appoint in this behalf."

Sub section (1) of Section 2A provides that upon the Act applying to an industrial establishment, the Model Standing Orders for every matter set out in the Schedule applicable to such establishment shall also apply from such date as the State Government may provide. The proviso is material because it specifically saves standing orders which were certified in respect of any industrial establishment before the date of coming into force of the Industrial Employment (Standing Orders) (Bombay Amendment) Act, 1957. The proviso therefore carves out an exception which is further clarified by the initial words thereof to the effect that nothing in the section shall be deemed to affect any Standing Orders which were certified before the Amending Act of 1957. In the present case, the Standing Orders were certified on 8th July, 1955 and as noted earlier at that stage the Schedule to the Act did not contain a reference to the age of superannuation. That is the reason why in the present case the Certified Standing Orders are silent in regard to the age of superannuation. Sub section (2) of section 2-A is equally significant because it operates as a non obstante

provision notwithstanding anything contained in the proviso to sub section (1). Model standing orders made in respect of a specific category of additional matters referred to in the Schedule - those relating to probationers or badlis or temporary or casual workmen shall also apply in relation to the workmen in the establishment unless they are in the opinion of the Certifying Officer less advantageous than the corresponding standing orders applicable under the proviso. Item 10-C of the Schedule deals with the employment or re-employment of probationers or badlis or temporary or casual workmen. The effect of sub section (2) is that Model Standing Orders relating to the employment or re-employment of probationers or badlis or temporary or casual workmen, would apply notwithstanding the proviso to sub section (1). This exception which has been carved out by the legislature in respect of one category which was brought in by the Bombay Amendment. It is only in respect of this category that the exception has been created. In the present case, the Certified Standing Orders are specifically saved by the proviso to sub section (1) to Section 2A. Section 12-A lays down that notwithstanding anything

contained in Sections 3 to 12, for the period commencing from the date on which the Act becomes applicable to an industrial establishment and ending on the date on which the standing orders as finally certified in the Act came into operation under Section 7, the prescribed model standing orders shall be deemed to be adopted in that establishment. Section 12-A prescribes the initial point of the application of the Model Standing Orders and the date on which these Model Standing Orders shall cease to apply viz. the date of certification of the standing orders. A Division Bench of the Karnataka High Court has held in **M.C. Raju vs. Executive Director,** 1985 I LLJ 210, that under Section 12A, the Model Standing Orders shall be deemed to be applicable until the Standing Orders are made, as contemplated under the Act. The reference to Standing Orders, as finally certified under the Act in Section 12A is to the first Standing Orders made for the establishment after the Act came into force. Hence, if the Model Standing Orders are amended subsequent to the coming into operation of the first Standing Orders in respect of the particular establishment, they do not automatically become applicable to the

establishment. The Division Bench held that steps would have to be taken to amend the existing Standing Orders, in accordance with Section 10 of the Act and unless this is done, the amended Standing Orders will not be applicable to the establishment. In **May & Baker Ltd. Vs. Kishore Jaikishandas Icchaporia**, 1991 Mh.L.J.1070, a Division Bench of this Court consisting of Mr.Justice S.P.Bharucha (as the Learned Chief Justice then was) speaking for the Division Bench held that under the Industrial Employment (Standing Orders) Act, 1946, the Model Standing Orders are applicable only until such time as amendments thereto have been proposed and certified. Once the amendments have been certified, the Certified Standing Orders operate. An amendment to the Model Standing Orders cannot, therefore, have effect until and unless modification of the certified Standing Orders to bring them into line with the amended Model Standing Orders is proposed and certified. The judgment of the Karnataka High Court was followed by Mr.Justice B.N.Srikrishna in **Voltas Limited vs. K.D.Kochargaonkar**, 1996 I LLJ 1173. The Learned Judge held that every amendment to the Model Standing Orders does not *per se* become

applicable to an industrial establishment which has Certified Standing Orders. In so far as the present case is concerned, the Model Standing Orders with reference to the age of retirement could possibly have no application to the establishment of the First Respondent in view of the fact that the Standing Orders were certified on 8th July, 1955 much prior to the coming into force of the Industrial Employment (Standing Orders) (Bombay Amendment) Act, 1957.

6. In so far as the second submission is concerned, the evidence would have to be scrutinized in order to consider as to whether the practice, if any, of retiring employees upon the completion of the age of 60 had ripened into a customary concession or privilege within the meaning of the IVth Schedule to the Industrial Disputes Act, 1947. In so far as this aspect of the matter is concerned, the evidence on the record clearly falls short of what is required to establish a long standing practice. The General Secretary of the Union who was one of the witnesses who deposed in support of the complaint produced a list of employees who had been retired at the age

of 60 years. Significantly, he has not stated that every employee or even a substantial member prior to the enforcement of the circular dated 6th August, 2001 was retired only at the age of 60. When the company's witness (A.D.Bhat) was cross examined one of the answers elicited in the course of cross examination was that several persons came to be retired on the attaining of the age of 60 years. The fact that certain persons had been retired only upon the completion of the age of 60 is, to my mind, not sufficient to establish the existence of a customary or long standing practice that the age of retirement in the establishment is 60 years. Stray or isolated cases do not make up a customary concession or privileges. The Industrial Court has held that these are stray cases and the category of the workmen who had retired at the age of 60 was different from the category of the complainant workmen. The evidence of the two workmen who stepped into the witness box is totally silent upon the existence of any customary concession or a long standing practice. In Blue Star Ltd. v. Blue Star Workers' Union, (1996 II. L.L.J. 1032), a Division Bench of this Court held thus :

> "A practice is a succession of acts of a similar kind or in a like employment (Webster’s Dictionary). Practice may be more or less common but it does not become a custom unless it is consciously accepted having the force of law."

Conscious as the Court must be of its limitations when dealing with an evidentiary finding in proceedings under Article 226/227, I do not see any reason to interfere with the finding of the Industrial Court.

7. Finally, it would be material to note that of the 13 workmen who form the subject matter of the complaint, 11 had accepted their dues and the complaint was not pursued any further on their behalf. Even in so far as the remaining two workmen are concerned, they had initially accepted their dues without protest and it was only subsequently that a letter of protest was submitted by the union. In the circumstances, I do not find any reason to interfere.

8. The Petition shall accordingly stand dismissed.